



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Vacco Industries

File: B-230036

Date: April 21, 1988

---

### DIGEST

1. Protester that took exception to a material requirement of a solicitation is an interested party to challenge award to only acceptable offeror since negotiations would have to be reopened or the solicitation canceled and the requirement resolicited if the protest were sustained.
2. General Accounting Office will not review protest that awardee cannot perform in accordance with solicitation's requirements, which is in effect a challenge to the contracting officer's affirmative determination of responsibility, absent a showing of fraud or bad faith or that definitive responsibility criteria have not been applied.
3. General Accounting Office (GAO) will not consider argument that agency's definition of its minimum needs was not sufficiently restrictive since GAO role in resolving bid protests is to promote full and open competition.

---

### DECISION

Vacco Industries protests the award of a contract to Velk Industries under request for proposals (RFP) No. N00181-87-R-0155, issued by the Norfolk Naval Shipyard for technical assistance, repairs, and testing of air reducing manifolds aboard a Navy vessel in Norfolk Harbor. Vacco argues that it should have received the award since its price, which the Navy incorrectly evaluated, was lower than Velk's. Vacco also argues that its technicians are more experienced than Velk's, and that Velk cannot perform in accordance with the requirements of the RFP. We deny the protest in part and dismiss it in part.

041952/135636

The RFP, as amended, requested the services of 3 technicians to repair 23 Vacco Industries air reducing manifolds. The solicitation provided estimates of the number of hours of straight time, overtime, Saturday labor, Sunday labor, and holiday labor that would be required for performance, and asked offerors for both unit and extended prices for each of the five labor categories. Award was to be made on the basis of price.

Three offerors, Vacco, Velk, and Valcon, Inc., submitted proposals in response to the RFP. Valcon's low offer was rejected as unacceptable, leaving Velk, with a price of \$54,312, as the lowest-priced, technically acceptable offeror. Vacco's price, as evaluated by the Navy, was \$57,180. On December 23, 1987, the Navy awarded a contract to Velk.

The Navy argues preliminarily that Vacco is not an interested party to challenge the award to Velk because it took exception to a material provision of the RFP in its offer and was therefore ineligible for award. The solicitation, as amended, provided that:

"THE NORFOLK NAVAL SHIPYARD WILL PROVIDE REPLACEMENT PARTS FOR THE MANIFOLDS EXCEPT AS NOTED IN ITEM 0003. THE GOVERNMENT FURNISHED MATERIALS ARE TO BE USED AS NECESSARY AND ARE LISTED ON ATTACHMENT (5). GOVERNMENT FURNISHED MATERIAL MAY INCLUDE REPAIR PARTS OBTAINED FROM THE NAVY SUPPLY SYSTEM WHICH MAY BE OTHER THAN THOSE MANUFACTURED BY THE ORIGINAL EQUIPMENT MANUFACTURER. IT IS THE GOVERNMENT'S INTENT THAT THESE PARTS BE INSTALLED ABOARD SHIP."  
(Emphasis added.)

Vacco responded to the underlined language by stating in its best and final offer:

"For parts, [for] which we are the original equipment manufacturer, and those furnished by the government [which] were not manufactured by Vacco, the Vacco technicians will not install those parts. Substitute parts manufactured by Vacco can be obtained from the Navy Supply System or directly from Vacco.

"If the Government elects to install parts, which were not manufactured by Vacco or a Vacco identified original equipment manufacturer, the Vacco technicians will not test the manifold and we disclaim liability for any failure of those manifolds."

Vacco does not dispute that it took exception to a material requirement by including this language in its offer.

Generally, a protester that takes exception to a material requirement of a solicitation is not an interested party to challenge the acceptability of another offeror's proposal because even if we agreed with the protester's objection, it would not be in line for award. Conrac Corporation, SCD Division, B-225646, May 11, 1987, 66 Comp. Gen. \_\_\_\_\_, 87-1 CPD ¶ 497. Where, as here, however, there are no other offerors in line for award, we think that the protester is interested because negotiations would have to be reopened or the solicitation canceled and the requirement resolicited if we agreed with the protester's complaint. Vacco is therefore an interested party to challenge the award to Velk.

Vacco contends that Velk cannot perform in accordance with the RFP requirement that "[t]he inspection, repairs and post repair testing shall be in accordance with NAVSEA Technical Manual S9558-AA-MMA-100 and the manufacturer's latest drawing" since the latter drawing is proprietary to Vacco and it has not furnished a copy to Velk. Vacco also argues that Velk cannot supply the "contingency material" (*i.e.*, non-government furnished material needed for the repair and testing of the manifolds) required by the solicitation schedule since "these parts are to be manufactured in accordance with detailed manufacturing drawings which are proprietary to Vacco and only in Vacco's possession."

Vacco does not allege--nor does the record reflect--that Velk took exception to either of these requirements in its offer. Further, there is no evidence that the contract has been modified to eliminate these requirements. Vacco's argument that Velk cannot perform in accordance with the RFP's requirements despite its compliant offer is a challenge to the contracting officer's determination that Velk is a responsible firm capable of performing as required. Our Office will not review a contracting officer's affirmative responsibility determination absent a showing that it was made fraudulently or in bad faith, or that definitive responsibility criteria in the solicitation were not met. Vacco has not made such a showing here. See Bid Protest Regulations, 4 C.F.R. § 21.3(m)(5) (1988); W.H. Smith Hardware Co., B-228576, Feb. 4, 1988, 88-1 CPD ¶ 110. Finally, whether Velk actually performs in compliance with the requirements is a matter of contract administration, which is the responsibility of the contracting agency and is not reviewable under our bid protest function. 4 C.F.R. § 21.3(m)(1); Discount Machinery and Equipment, Inc., B-227884.2, July 30, 1987, 87-2 CPD ¶ 120.

Vacco next argues that the Navy deliberately miscalculated its overall price in order to displace it as the low offeror. We need not determine whether or not Vacco's price was indeed low for purposes of deciding this protest, however, given our foregoing conclusion that Vacco's offer was unacceptable. Since Vacco took exception to a material requirement of the RFP, it would not have been eligible for award even if its price had been low.

Vacco also objects to the fact that although previous solicitations for manifold repairs have required that the contractor have "a proven record of repair of Vacco air reducing manifolds," in this solicitation the requirement was relaxed to permit either the above or "equivalent experience." Vacco contends that the requirement was relaxed to permit Velk to compete and that the decision not to require previous experience in repairing Vacco manifolds compromises the Navy's needs.

In response, the Navy acknowledges that the requirement was relaxed to permit competitors without specific experience with the type of work to be performed under the contract to compete. The Navy reports, however, that the revised provision is consistent with its minimum needs.

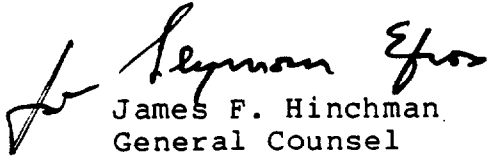
We will not consider this basis of protest since Vacco is in essence arguing that the agency's statement of its needs is not sufficiently restrictive. Our role in resolving bid protests is to ensure that the statutory requirement for full and open competition in the award of government contracts is met; we therefore will not consider a protest that an agency requires more restrictive specifications to meet its minimum needs. Baird Corp.--Reconsideration, B-228190.2, Oct. 5, 1987, 87-2 CPD ¶ 336. In any event, this ground of protest is untimely. A protest based on an alleged impropriety in a solicitation that is apparent prior to the closing date for receipt of proposals must be filed prior to the closing date. 4 C.F.R. § 21.2(a)(1).

Finally, Vacco objects to the Navy's delay in notifying it of the contract award. Vacco contends that the Navy deliberately waited more than 10 days after award before notifying it so that it would not be able to file its protest in time to invoke the stay provision in the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(d) (Supp. III 1985).

The Navy has provided no explanation for its delay in notifying Vacco of the award to Velk. Tardiness in notifying unsuccessful offerors is a procedural defect that

does not affect the validity of a contract award, however.  
Paul G. Koukoulas, et al., B-229650, et al., Mar. 16, 1988,  
88-1 CPD ¶ \_\_\_\_\_. Moreover, the protester was not prejudiced  
by the delay as the protest is denied on its merits.

The protest is denied in part and dismissed in part.

  
James F. Hinchman  
General Counsel